88-1556

Supreme Court, U.S.
FILED
MAR 17 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. A-711

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

JESUS ANTONIO CALVO, PETITIONER
v.
THE UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE SEVENTH CIRCUIT

Stephan A. DeSales, Esquire
Member of the Bar of the Supreme Court
2201 East Chapman Avenue
Fullerton, California 92631
(714) 992-0211

QUESTION PRESENTED

Whether a criminal defendant received inadequate assistance of counsel during plea negotiations where retained counsel also represented a co-defendant, when counsel failed to recognize an actual conflict of interest until petitioner rejected a negotiated plea on the date set by the prosecution for acceptance or revocation of the settlement offer.

TABLE OF CONTENTS

Page

Opinions below..... 5
Jurisdiction.....5
Constitutional and statutory provisions involved.....5
Statement of the Case.....7
Reasons for granting the petition..... 10
Conclusion.....20
Appendix A.....A21 - A28

TABLE OF AUTHORITIES

Cases:

Alvarez v. Wainwright, 522 F.2d 100 (5th Cir. 1975)..... 13,14
Baty v. Balkcom, 661 F.2d 391 (5th Cir. 1981)..... 12,13
Brewer v. Williams, 430 U.S. 387 (1977)..... 10
Cuyler v. Sullivan, 446 U.S. 335 (1980).....11,14
Glasser v. United States, 315 U.S. 60 (1942).....11,14
Hamilton v. Alabama, 368 U.S. 52 (1961)..... 18
Holloway v. Arkansas, 435 U.S. 475 (1978)..... 12
McMann v. Richardson, 397 U.S. 759 (1970)..... 11
Mone v. Robinson, 430 F.Supp. 481 (D.Conn. 1977).....13
Powell v. Alabama, 287 U.S. 45 (1932)..... 10
Ruffin v. Kemp, 767 F.2d 748 (11th Cir. 1985).....12
Strickland v. Washington, 466 U.S. 668 (1984)...11,14
Thomas v. Foltz, 818 F.2d 476 (6th Cir. 1987); cert. denied, 108 S.Ct. 198 (1987)..... 13
United States v. Wade, 388 U.S. 218 (1967)..... 11
White v. Maryland, 373 U.S. 59 (1963)..... 18

Constitution, statutes, and regulation:

United States Constitution:

Sixth Amendment 5

United States Codes:

21 U.S.C. § 841(a)(1)..... 6
21 U.S.C. § 846.....6
28 U.S.C. § 1254.....6

No. A-711

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

JESUS ANTONIO CALVO, PETITIONER

v.

THE UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEAL FOR THE SEVENTH CIRCUIT

Stephan A. DeSales, on behalf of Jesus Antonio Calvo, petitions for a writ of certiorari to review the judgement of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The judgment of the Seventh Circuit Court of Appeals is unreported and is printed in Appendix A. (Infra, page A21). The judgment of the jury trial is also unreported and is printed in Appendix A. (Infra, page A28).

JURISDICTION

The judgment of the court of appeals (Appendix A, infra, page A21) was entered on December 19, 1988. Counsel below failed to file a timely petition for rehearing. The time allowed by the Rules of the Supreme Court of the United States for filing a petition for a writ of certiorari expired on February 17, 1989. Counsel applied for a thirty day extension of time for filing petition for certiorari on February 28, 1989. The application was granted by Mr. Justice Stevens on March 10, 1989, extending the period for filing a petition for certiorari to and including March 20, 1989. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment VI provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; and to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

United States Codes provisions:

21 U.S.C. § 841(a)(1) provides in pertinent part: "(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally - (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance".

21 U.S.C. § 846 provides: "Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

28 U.S.C. § 1254 provides in part: "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

STATEMENT OF THE CASE

On July 20, 1987, law enforcement officers, acting on an informant's tip, established surveillance of a Chicago location. Petitioner Calvo and three companions approached the building in a white Cadillac. Calvo entered the structure, followed shortly thereafter by Guillermo Daza. The remaining occupants of the vehicle, Jose Garcia and Luz Guevera, then circled the area in the car.

A short time later, Calvo and Daza rejoined their companions in the Cadillac, which proceeded to drive in a "circuitous" manner. Calvo then boarded a city bus while his companions stopped in a tavern and then drove around some more. Calvo was later picked up in the same location where he had boarded the bus.

Calvo drove the Cadillac some distance, then got out and spoke with two men. He then drove to a Ford and gave Jose

Garcia the keys to the vehicle. Garcia followed the Cadillac, running a red light in the process. Both vehicles were then stopped by law enforcement. Inside the Ford, hidden behind the vehicle's side panels, officers located ten packages containing ten kilograms of 97 percent pure cocaine.

On August 26, 1987, petitioner Calvo, Daza, Garcia and Guevara were charged with possession with intent to distribute cocaine in violation of 21 U.S.C. § 841(a)(1) and with conspiracy to commit the substantive offense in violation of 21 U.S.C. § 846.

Petitioner Calvo and Daza were both represented by attorney Marvin Bloom, while Garcia and Guevera each had independent counsel. On September 9, 1987, Garcia, Daza and Guevera entered guilty pleas. Daza received a one year term, while Garcia and Guevara accepted plea bargains calling for an unspecified period of incarceration. The negotiated disposition which Mr. Calvo declined placed a seven year lid on imprisonment.

Prior to the petitioner's rejection of the plea agreement, attorney Bloom perceived no conflict of interest in his joint representation of Calvo and Daza. When petitioner Calvo rejected the plea agreement Bloom was uncertain as to whether

the joint representation presented a conflict of interest. He therefore requested a one week continuance in order to evaluate his position.

Mr. Pearl, the Assistant United States Attorney, agreed to the continuance. However, he informed the court, Attorney Bloom and petitioner Calvo that the plea agreement would be withdrawn after September 9, 1987. Additionally, he outlined for the record two potential conflict situations in Bloom's continued representation of petitioner and Daza. First, he noted that, by virtue of Mr. Daza's plea, he could be called as a witness to testify at trial against Calvo. Second, he theorized that at sentencing Daza might maintain his involvement in the transaction was minimal, thereby attempting to shift the burden of criminal responsibility to petitioner.

In light of these developments, the court requested that independent counsel be brought into the courtroom to review the situation with petitioner. Mr. Daniel Martin from the Federal Defender Program was therefore summoned. After a brief consultation with Mr. Calvo, he informed the court that petitioner was aware that the government's settlement offer

was only good for that date. Proceedings were then adjourned.

On November 25, 1987, petitioner was charged with the same offenses in a superceding indictment. Following a trial by jury, he was convicted of both offenses. The court then sentenced Mr. Calvo to 16 years imprisonment.

REASONS FOR GRANTING THE PETITION

This case squarely presents an important question regarding a criminal defendant's Sixth Amendment right to the assistance of counsel in plea negotiations and pre-trial proceedings in a multiple representation context. On the present facts, Attorney Bloom represented two of four co-defendants in plea negotiations. However, when the petitioner rejected the negotiated disposition, counsel was left befuddled and unable to provide vigorous representation for petitioner at a critical stage of the proceedings. Consequently, the prosecution's offer was withdrawn and the matter proceeded to trial with new counsel.

The Supreme Court has acknowledged the value of counsel in pre-trial proceedings since Powell v. Alabama, 287 U.S. 45, 57 (1932). In Brewer v. Williams, 430 U.S. 387 (1977), the Court held that, at a minimum, a criminal

defendant is entitled to the assistance of counsel from the time criminal proceedings are initiated against him. Id. at 398. Indeed, the Court has stated that the Sixth Amendment guarantees that the criminal defendant need not stand alone at any stage of the proceedings "where counsel's absence might derogate from the accused's right to a fair trial." United States v. Wade, 388 U.S. 218, 226 (1967).

The right to counsel encompasses more than the mere physical presence of one licensed to practice law. Strickland v. Washington, 466 U.S. 668, 685 (1984). Thus, "the right to counsel is the right to the effective assistance of counsel." McMann v. Richardson, 397 U.S. 759, 771 (1970).

The court has been sensitive to the tension between this fundamental constitutional guarantee and multiple representation, which implicates the right to counsel of choice, since Glasser v. United States, 315 U.S. 60 (1942). In Glasser, the court held that "the 'assistance of counsel' guaranteed by the Sixth Amendment contemplates that such assistance by untrammeled and unimpaired by a court order requiring that one lawyer simultaneously represent conflicting interests." Id. at 70. Thus, where the interests of multiple clients do not mesh, the lawyer representing them fails to

provide the adequate assistance contemplated by the Sixth Amendment.

Multiple representation does not inevitably result in constitutionally deficient assistance of counsel. In Cuyler v. Sullivan, 446 U.S. 335 (1980), the Court stated that a defendant claiming inadequate assistance due to multiple representation bears the burden of demonstrating an actual conflict of interest which adversely affected the attorney's performance. Id. at 350. An actual conflict of interest has been defined in the following terms: "An attorney actively represents conflicting interests 'if counsel's introduction of probative evidence or plausible arguments that would significantly benefit one defendant would damage the defense of another defendant whom the same counsel is representing.'" Ruffin v. Kemp, 767 F.2d 748, 750 (11th Cir. 1985), quoting Baty v. Balkcom, 661 F.2d 391, 395 (5th Cir. 1981).

Actual conflicts can arise at any stage of the criminal proceedings. A conflict can be detected not only in counsel's actions, but in the options he fails to explore. Holloway v. Arkansas, 435 U.S. 475, 489-490 (1978). Specifically, a conflict can prevent the attorney from engaging in a plea

negotiations, such as an agreement to have one defendant testify against another in exchange for a favorable disposition. Id. at 480. Determining the impact of a conflict on plea negotiations can be difficult, if not impossible. Id. at 491.

The criminal defendant is entitled to the adequate assistance of counsel "untrammeled by conflicting loyalties" in determining whether to enter a guilty plea. Mone v. Robinson, 430 F.Supp. 481, 486 (D. Conn. 1977). An actual conflict of interest by counsel representing multiple defendants during plea negotiations has been recognized by the lower Federal courts as satisfying the Cuyler test for inadequate assistance of counsel. Baty v. Balkcom, 661 F.2d 391, 387 (5th Cir. 1981). Thus the attorney who fails to pursue individual plea negotiations on behalf of one client for fear of injuring a co-defendant labors under an actual conflict of interest. Thomas v. Foltz, 818 F.2d 476, 481 (6th Cir. 1987); cert denied, 108 S.Ct. 1987. Similarly, when counsel advises one client to reject a favorable plea bargain which contemplates testimony against a second co-defendant because such testimony would be injurious to the co-defendant, there is an actual conflict of interest. Alvarez v. Wainwright, 522 F.2d 100, 102-103 (5th Cir. 1975).

Counsel also provides ineffective assistance when his plea bargain strategy contemplates the sacrifice of one client's interests in favor of the interests of a co-defendant client. Mone, 430 F.Supp. at 486.

These standards are equally applicable to appointed and retained counsel. When private counsel represents multiple defendants, the requisite state action implicating the Sixth Amendment can be discerned through the participation of the prosecutor in the plea negotiations or the trial judge's knowledge or awareness of counsel's ineffectiveness. Alvarez, 522 F.2d at 105.

The criminal defendant who demonstrates that counsel acted under an actual conflict of interest in a multiple representation context need not make a further showing of actual prejudice in order to obtain relief. Cuyler, 446 U.S. at 349-350. When an actual conflict impairs counsel's performance, prejudice is presumed. Strickland, 466 U.S. at 692. As the Court rightfully stated in Glasser: "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." 315 U.S. at 76.

In the case now before the Court, Attorney Bloom represented two of four co-defendants accused of possession of cocaine with intent to distribute and conspiracy to commit that substantive offense. An actual conflict impairing counsel's performance can be readily discerned from the record of proceedings on September 9, 1987. Attorney Bloom clearly entertained only one possible scenario resulting from his joint representation of two co-defendants: that both men would accept a plea bargain. Thus his negotiations with the prosecution looked to a single result, a "package deal." His energies, then, were focused on convincing his clients to plead guilty together. It is evident from the record that counsel never entertained a disposition calling on petitioner to plead to a lesser offense or an agreed upon sentence in exchange for testimony against defendant Daza.

A second indication of an actual conflict which impaired Bloom's representation of petitioner is that counsel obviously failed to consider all of the ramifications of the joint representation. More specifically, counsel, who had interviewed both clients, failed from the beginning to perceive that the interests of the two men were inherently divergent. This dissimilarity is patent from the nature of the charges. In

order for one client to minimize his culpability, it was clearly needful to claim ignorance of the full dimensions of the transaction and shift responsibility to the remaining co-defendant. Indeed, Daza, Garcia and Guevera all informed the court of their lack of knowledge of the contours of the transaction. All stated under oath to merely be assisting petitioner in an effort to minimize their involvement and heap responsibility on petitioner. Attorney Bloom merely stood by silently as one of his clients, Mr. Daza, attempted to lay the blame at petitioner's door. This aspect of the actual conflict is transparent from the record. It surpasses credulity to assume that counsel was ignorant of the conflict until petitioner declined the negotiated settlement.

Counsel's lack of foresight is also apparent from his obvious confusion before the court on September 9, 1987. Even at that late date, he was uncertain as to the existence of a conflict of interest and requested a continuance in order to evaluate his position. Such analysis should have taken place before counsel accepted joint employment, not in the midst of critical proceedings.

Most importantly, counsel's actual conflict of interest and deficient representation left petitioner essentially alone and

without competent assistance at a vital juncture in the proceedings. Attorney Bloom was a mere spectator as the United States Attorney, the Court and a Federal Defender recited time and again that the prosecution's settlement offer would expire at the conclusion of proceedings on September 9, 1987. Such advisals, however, were obviously of no benefit to the petitioner. None of the individuals mouthing this fact enjoyed an attorney-client relationship with Mr. Calvo. Consequently they could not evaluate his legal position. None of these speakers were familiar with petitioner's background and prior record. With the exception of the United States Attorney the speakers were unfamiliar with the facts, or the case. They were therefore ignorant of the relative strength of the government's evidence and any possible defenses available to petitioner. Hence, none were competent to tender what Mr. Calvo desperately needed at that juncture: sound legal advice. Manifestly, none of these parties could attempt a plea settlement favorable to Mr. Calvo at a time when the prosecution stated that any subsequent negotiations would entail a greater criminal penalty for petitioner.

This painful scenario was only exacerbated by the language barrier confronting petitioner, for all of the

discussions of September 9, 1987, were filtered through a Spanish language translator.

Petitioner's isolation in these proceedings with a confused and silent attorney the court characterized as potentially compromised is tantamount to facing the power of the government alone and without benefit of counsel. A useful analogy can therefore be drawn to cases in which the defendant was unrepresented at critical stages in the proceedings and irretrievably lost valuable rights and opportunities. For example, in Hamilton v. Alabama, 368 U.S. 52 (1961), the petitioner was without counsel at arraignment, entered a plea of not guilty and, under state law, forfeited the opportunity to advance an insanity defense without leave of court. Similarly, in White v. Maryland, 373 U.S 59 (1963), the petitioner pled guilty at arraignment without benefit of counsel. Though he was later permitted to withdraw the plea, it was introduced against him at trial. In both of these cases, the Court reversed the convictions without the necessity of a showing of prejudice.

Petitioner's counsel at the critical proceedings on September 9, 1987, was professedly confused and, from the record, unable to tender competent legal advice to Mr. Calvo.

As a consequence, subsequent plea negotiations were irretrievably impaired. In petitioner's view, the record is replete with prejudice. Consequently, he respectfully prays that the Court grant the petition for certiorari.

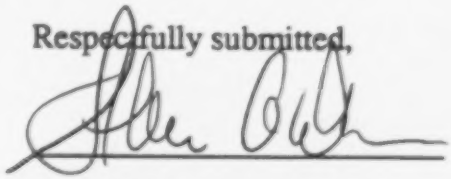
In addition to remedying the prejudice suffered by Mr. Calvo, granting the petition will present the Court with a unique opportunity to clarify the contours of the Sixth Amendment right to the assistance of counsel in the pre-trial setting, particularly in the context of plea negotiations where a single attorney represents multiple clients.

The Court's decision's, from Glasser through Holloway and Cuyler recognize the valuable role of counsel in pre-trial proceedings, including plea negotiations. However, none of the Court's cases have addressed the merits of a multiple representation plea negotiations inadequate assistance of counsel issue. The lower courts have therefore been left to adapt the Cuyler formulation to the plea negotiation context without benefit of the Court's guidance. Granting certiorari in this case, then, will permit the Court to clarify the law in a vital area and ensure its uniform application throughout the lower federal courts and state courts.

CONCLUSION

For all of the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,



STEPHAN A. DeSALES
Attorney for Petitioner
Jesus Antonio Calvo

In the

United States Court of Appeals

For the Seventh Circuit

No. 88-1371

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JESUS ANTONIO CALVO,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 87 CR 538—**Ann C. Williams**, Judge.

ARGUED SEPTEMBER 8, 1988—DECIDED DECEMBER 19, 1988

Before BAUER, *Chief Judge*, WOOD, and RIPPLE, *Circuit Judges*.

BAUER, *Chief Judge*. Jesus Antonio Calvo appeals from his convictions for possession with intent to distribute cocaine, 21 U.S.C. § 841(a)(1), and conspiracy to distribute cocaine, 21 U.S.C. §§ 841(a)(1) and 846. He contends that the district court committed a number of errors warranting reversal of his convictions. We disagree with each contention, however, and affirm.

I.

Acting on an informant's tip, law enforcement officers established surveillance of a building at 1412 West Irving

Park Road in Chicago on July 20, 1987. At about 4:00 p.m. that afternoon, Calvo pulled up in front of the building in a white Cadillac. Guillermo Daza, Jose Garcia, and Luz Guevera also were in the car. Calvo entered the building carrying a brown paper bag. While inside, he telephoned a mobile phone connected to the Cadillac's cigarette lighter and requested Daza to join him. Daza, carrying a large envelope and the mobile telephone, then entered the building.

As Daza entered the building, Garcia and Guevera circled the area in the Cadillac. A short time later, they picked up Daza and Calvo, and proceeded to drive in a "circuitous" manner around the area. Inside the Cadillac, Calvo had a pager, which he used seven or eight times while in the car. He also talked on the mobile telephone a number of times, using code words to refer to drugs. At one point, Calvo got out of the Cadillac and boarded a city bus, instructing Daza to drive around until Calvo called him on the mobile telephone. Daza then drove the Cadillac to a tavern, which he and Guevera entered, taking the mobile telephone with them. They left a short time later and, with Guevera, drove around some more, in the process stopping to make more telephone calls. After a while, they picked up Calvo in the same place where he earlier had boarded the city bus.

Calvo proceeded to drive the Cadillac to the vicinity of Armitage and Kenneth Streets in Chicago, where he got out of the car and spoke with two men. Calvo then drove the Cadillac a short distance and parked near a brown Ford. Calvo gave Garcia the keys to the Ford and told Garcia to follow the Cadillac, which Garcia did. Calvo, driving the Cadillac, soon made a right-hand turn; when Garcia followed in the Ford, he ran a red light. At that point, law enforcement officers stopped both the Ford and the Cadillac.

When the officers questioned Calvo, Daza, and Guevera, they claimed never to have seen the brown Ford or Garcia, its driver. Garcia, in turn, denied knowing anything

about the Cadillac or its occupants. Inside the Ford, the officers found ten packages of cocaine concealed behind the car's side panels. In all, the packages contained ten kilograms of 97 percent pure cocaine worth millions of dollars on the street. Inside the Cadillac, the officers found the mobile telephone, a test tube, and a test tube holder, among other things. Calvo had a beeper on his belt when he was arrested and was carrying a California driver's license and Florida vehicle registration card, each bearing his name. Guevera had two screw drivers in her purse.

On August 26, 1987, Calvo, Daza, Garcia, and Guevera together were charged in an information with possession with intent to distribute cocaine in violation of 21 U.S.C. § 841(a)(1), and with conspiracy to commit that offense in violation of 21 U.S.C. § 846. After Daza, Garcia, and Guevera pled guilty on September 9, 1987, Calvo was charged with the same offenses in a superseding indictment filed on November 25, 1987. Following a jury trial, Calvo was found guilty of both offenses. The district court sentenced him to 16 years in prison, a $25,000 fine, 15 years supervised release, and five years probation.

II.

A.

Calvo's first contention is that the district court violated his Sixth Amendment right to confront and cross-examine witnesses when it permitted the government to read into evidence a statement made by Daza at the time he pled guilty. At his guilty plea, Daza, who did not testify at Calvo's trial, told the district court his version of what occurred on July 20, 1987, the day he and the others were arrested. Later during the same proceeding, the district court asked Guevera for her version of that day's events. In response to the court's first question "What did you do that day, July 20, 1987?," Guevera responded, "the same thing that Mr. Daza says."

Guevera *did* testify at Calvo's trial, and defense counsel during his cross-examination began to question her about

statements she made during her guilty plea. At a sidebar requested by the government, defense counsel explained his intentions:

> My theory is this: I am going to go into the fact that she had to make a statement on the day she pled guilty and she had to tell [the court] about her involvement, and that she knew if she showed herself to only have a minor role in this transaction, that she would get a better sentence.

The court then ruled that it would permit that line of questioning only if defense counsel actually confronted Guevera with her prior statement, at which point the prosecutor warned defense counsel that Guevera "signed a plea agreement that has the government's recitation of facts. Now if you go along with that, I'll put that in as a prior consistent statement."

Undaunted, defense counsel during Guevera's cross-examination read the court's questions and Guevera's answers from the transcript of her guilty plea, including her statement that she had on July 20, 1987 done the "same thing Mr. Daza says." After defense counsel finished, the government sought to read into evidence Daza's statement of what occurred on July 20, 1987, arguing that Guevera had adopted Daza's statement in her colloquy with the court at the guilty plea. Defense counsel argued that Daza's statement should not be read into evidence because, after stating that she did the same thing Daza did on the day of her arrest, Guevera at her guilty plea "clarified what her statement of facts were, and she went on to state what she meant and what her versions of what happened was in some detail." The district court ruled, however, that because Guevera adopted Daza's statement as her own during her plea, defense counsel opened the door to Daza's statement being read into evidence by reading Guevera's statement into evidence.

Calvo argues that the district court's ruling violated his Sixth Amendment rights because he had no opportunity to cross-examine Daza when he gave his statement at the

guilty plea. This argument is without merit, however, if, as the district court found, Guevera did in fact adopt Daza's statement as her own at the guilty plea. Calvo argues that Guevera did not adopt Daza's statement because, after her reference to Daza's statement, Guevera gave her own version of the events of July 20, 1987. But the district court rejected this argument at trial and we cannot conclude that it abused its discretion in doing so. Indeed, the district court heard Guevera's statements at her and Daza's guilty plea and thus was in an advantageous position to determine whether Guevera did, in fact, adopt Daza's statements as her own. Calvo also argues that, even if the district court correctly concluded that Guevera adopted Daza's statement, its prejudicial effect outweighed any probative value it might have had. Again, we disagree. In our view, defense counsel made a considered tactical decision in choosing to question Guevera about her statement at the guilty plea. Calvo cannot complain of it now.

B.

Calvo also asserts that the district court erred in making a number of other evidentiary rulings at trial. He claims that he was denied a fair and impartial trial when the court refused to exclude (1) testimony by Guevera that she recently had come to the United States from Columbia; (2) testimony by Garcia that he was from Columbia and that he heard Calvo use the word "apparatus," which he knew was a Columbian code word meaning one kilogram of cocaine; (3) testimony concerning the purity level and street value of the cocaine confiscated from the brown Ford; and, (4) records of telephone calls made to and from Calvo's mobile telephone during the period of July 17-20, 1987, and the California driver's license and Florida vehicle registration bearing Calvo's name. According to Calvo, any probative value of the above testimony was outweighed by its prejudicial effect on the jury and the documentary evidence was irrelevant.

We find no error, however, in any of the court's rulings with respect to these evidentiary matters. As for Calvo's first two contentions, we note that because Calvo on the day he was arrested used a Columbian code word for a kilogram of cocaine—an important item of evidence of his guilty knowledge—Garcia's testimony that he was from Columbia was necessary to show how he knew the meaning of the code word. In addition, the district court, among other actions taken to minimize any prejudice to Calvo resulting from his nationality, instructed the jurors at the conclusion of all the evidence that they should not be influenced by any person's national ancestry. As for Calvo's third contention, certainly the purity of the cocaine and its street value were relevant to whether Calvo intended to distribute that cocaine. *See United States v. Costa*, 691 F.2d 1358, 1361-62 (11th Cir. 1982); *United States v. Kelly*, 679 F.2d 135, 136 (8th Cir. 1982) (per curiam). We simply cannot conclude that the admission of such testimony about the cocaine's qualities was not within the trial court's broad discretion.

Finally, the court did not abuse its discretion in admitting the documentary evidence. With respect to the phone records, Calvo failed to object to their introduction at trial and we cannot possibly conclude that the district court committed plain error in excluding them. *See United States v, Kerley*, 838 F.2d 932, 937 (7th Cir. 1988) ("A plain error is not just one that is conspicuous but one whose correction is necessary to prevent a 'miscarriage of justice.' ") (quoting *United States v. Young*, 470 U.S. 1, 15 and n.12 (1985)). Testimony at trial showed that drug dealers often use mobile and pay telephones as well as beepers when buying and selling drugs to minimize the risk of detection. The telephone records, therefore, were circumstantial evidence that Calvo was engaged in a conspiracy to, and did in fact, distribute drugs. The driver's license and vehicle registration also were relevant because they showed that Calvo resided in both California and Florida, and some of the phone calls made from Calvo's mobile telephone were to Miami, Florida, and Los Angeles,

California. In addition, the brown Ford had California license plates.

In short, none of Calvo's contentions has any merit whatsoever, and the district court therefore is

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA 79004—Midwest Law Printing Co., Inc., Chicago—12-19-88—500

DEFENDANT: JESUS ANTONIO CALVI

NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

87 CR 538-2

JUDGMENT AND PROBATION/COMMITMENT ORDER

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date: 02 12 1988

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired counsel appointed by the court and the defendant thereupon waived assistance of counsel

[X] WITH COUNSEL MITCHELL KREITER
(Name of counsel)

PLEA

[ ] GUILTY, and the court being satisfied that there is a factual basis for the plea. [ ] NOLO CONTENDERE [X] NOT GUILTY

FINDING & JUDGMENT

There being ~~a jury~~/verdict of [ ] NOT GUILTY. Defendant is discharged
[X] GUILTY.

Defendant has been convicted as charged of the offense(s) of knowingly, willfully and unlawfully of possessing with intent to distribute a mixture containing cocaine, a Schedule II Narcotic Drug Controlled Substance; also conspiring to commit the above offense; in violation of Title 21, United States Code, Sections 841(a)(1) and 846.

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of 16 years and fined the sum of $25,000 to be followed by 15 years of supervised release on count 1 of the superseding indictment."

"IT IS ADJUDGED that on count 2 the imposition of sentence is hereby suspended and the defendant is placed on probation for a period of 5 years, on condition that if he is deported he make no illegal re-entry into the United States; if he does re-enter the United States he is directed to notify the Probation Department within five days; that he remain drug free and that he comply with the general conditions of probation and that he is fined the sum of $25,000. Said sentence on count 2 to run consecutively to sentence imposed on count 1."

"IT IS FURTHER ORDERED that fine on each of counts 1 and 2 to run cumulatively for a total fine of $50,000."

"It is the further order of this Court pursuant to 18 U.S.C. section 3013(a) that the defendant is assessed the sum of $50 on each of counts 1 and 2 for a total assessment of $100." "IT IS FURTHER ORDERED original counts dismissed on oral motion of government."

SPECIAL CONDITIONS OF PROBATION

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, extend the term of probation, or revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General

FEB 2 0 1988

[X]

Ann Claire Williams

ANN C. WILLIAMS

FEBRUARY 12, 1988

No. A-711

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

JESUS ANTONIO CALVO, PETITIONER
v.
THE UNITED STATES OF AMERICA

PROOF OF SERVICE

Stephan A. DeSales, Esquire
Member of the Bar of the Supreme Court
2201 E. Chapman Avenue
Fullerton, CA 92631
(714) 992-0211

The undersigned, Pamela Hubbard, acting for and on behalf of attorney for Petitioner herein, hereby certifies that on March 16, 1989, she served the foregoing PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE SEVENTH CIRCUIT on all of the parties to this appeal, by mailing copies thereof by Federal Express courier, postage prepaid, addressed to their attorneys, as follows: To Mr. William C. Bryson

Acting Solicitor General, U.S. Department of Justice, 10 Constitution Avenue, NW, Washington D.C.,20530 (3 copies), attorney for the United States of America; To Thomas F. Strubbe, United States Court of Appeals for the Seventh

Circuit, 219 S. Dearborn Street, Chicago, IL 60604 (1 copy); Office of the Clerk, Supreme Court of the United States, 1 First Street Northeast, Washington, DC 20543 (Original and 40 copies).

Executed this 16th day of March, 1989, at Fullerton, California.

Pamela Hubbard

PAMELA HUBBARD - Secretary to
STEPHAN A. DeSALES
Attorney for Petitioner
2201 E. Chapman Avenue
Fullerton, CA 92631